Supreme Court, U.S.
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No. —

IN THE

Supreme Court of the United States

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, and UNITED STEELWORKERS OF AMERICA, LOCAL 14398,
Petitioners,

v.

APPALACHIAN REGIONAL HEALTHCARE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Should the decision of the court of appeals below be vacated and remanded for reconsideration in light of this Court's *per curiam* decision in *Major League Baseball Players Association v. Garvey*, 532 U.S. __, 69 U.S.L.W. 3725 (No. 00-1210, decided May 14, 2001) which was decided four days after the denial of the rehearing petition in this case?

II. May a Federal Court declare that collective bargaining agreements inherently contain the reserved rights theory of management prerogatives and then vacate an arbitrator's award, which found that a labor agreement was silent on part-time employees being required to work over their scheduled time, as contrary to the reserved management right to require part-time employees to work overtime?

III. Should the outside limit for vacating a labor arbitration award be the standards set forth in Section 10(a) of the Arbitration Act?

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PETITION FOR A WRIT OF CERTIORARI

The United Steelworkers of America, AFL-CIO·CLC and its Local 14398 respectfully petition this Court for issuance of a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Sixth Circuit in *Appalachian Regional Healthcare, Inc. v. United Steelworkers of America, AFL-CIO-CLC, Local 14398, and United Steelworkers of America*, No. 99-6590 (2001).

OPINIONS BELOW

The opinion of the divided court of appeals below, with Judge Gilman dissenting, is reported at 245 F.3d 601 and is reproduced as Appendix A. App. 1a. The order of the court

of appeals below denying the petition for rehearing and suggestion for rehearing *en banc* is reproduced as Appendix D. App. 25a. The opinion of the district court is unreported and is reproduced as Appendix B. App. 15a. The opinion and award issued by Arbitrator W. Scott Thomson is unreported and is reproduced as Appendix C. App. 18a.

JURISDICTION

The court of appeals below entered its Judgment on March 29, 2001. A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was denied on May 10, 2001. App. 25a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The district court below had jurisdiction over this case under Section 301(a) of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a) ("Section 301"). The court of appeals below had jurisdiction of this case pursuant to 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

Section 301 provides, in relevant part:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . may be brought in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy or without regard to the citizenship of the parties."

Section 10(a) of the Arbitration Act, 9 U.S.C. §10(a), provides, in relevant part, as follows:

> "(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> (1) Where the award was procured by corruption, fraud, or undue means.

(2) Where there was evident partiality or corruption in the arbitrators, or either of them.

(3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or any other misbehavior by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

. . . ."

STATEMENT

Respondent Appalachian Regional Healthcare, Inc. ("Company") and petitioner United Steelworkers of America ("Union") were parties to a collective bargaining agreement ("1995 CBA"). App. 26a. [1] The 1995 CBA requires disputes between the parties to be settled in accordance with the grievance and arbitration procedure. App. 28a. The 1995 CBA also contains a broad no strike clause: App. 28a.

In the 1995 CBA, the Company recognized the Union as the representative of both "the full time and regularly employed part-time" employees. App. 26a. The 1995 CBA sets forth the difference between these employees. Article XV states that the "basic work week [for all employees under this Article] shall be forty (40) hours per week . . .", while Article XLVII, "PART TIME EMPLOYEES", specifies that "[t]he term 'regularly employed part-time Employee' refers to persons who regularly work a number of hours and days a week which are less than the customary full forty (40) hour

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[1] The relevant provisions of the 1995 CBA are reproduced in Appendix E.

work week." App. 26a, 29a. Article XLVII also states that regularly employed part-time employees "shall customarily work on a regular part-time scheduled basis . . ." and "shall enjoy proportionate holiday, vacation and sick leave benefits . . . ." App. 29a.

A dispute arose between the Company and the Union when the Company discharged three part-time laundry room employees for refusing on January 2, 1998, to obey an order to work beyond their regular part-time schedule of 4:30 p.m. to 8:30 p.m. App. 21a. This was the second time in less than a week that they had refused to work over. App. 20a-21a.

The Company and the Union selected Arbitrator W. Scott Thomson to hear the matter concerning the discharge. App. 19a. Arbitrator Thomson held a hearing on October 13, 1998, and both parties submitted testimony, argument and post-hearing briefs. App. 19a. The issue submitted for decision was "[w]hether the Employer had just cause to discharge Grievants . . . ." App. 20a. On December 11, 1998, Arbitrator Thomson issued an Opinion and Award granting the grievance and directing that the employees be reinstated but with back pay only for the period January 3 to March 2, 1998. App. 24a.

Arbitrator Thomson began by holding that the 1995 CBA "provides for two types [of] employees, (1) regular full time employees, and (2) regular part-time employees." App. 22a. He reached that conclusion after noting that Article XV provided for a regular work day of 8 hours and a regular work week of 40 hours. App. 22a. He contrasted that with the fact that Article XLVII defined a regular part-time employee in terms of "persons who regularly work a number of hours and days a week which are less than the customary full forty (40) hour workweek." App. 22a. He also noted that the 1995 CBA specified that regular part-time employees "shall work [on] a regular part-time scheduled basis. . . ." App. 22a.

Arbitrator Thomson concluded that part-time employees were outside the scope of the contractual overtime provisions because "Article XV, Section B, only mandates 'overtime' work when employees are requested to work in excess of eight hours per day." App. 23a. He noted that "[t]here is no provision permitting the Employer to require an employee to work more than their regular scheduled part-time hours." App. 23a. This was significant, because while "Article XLII only permits the Employer to direct the working force and of establishing reasonable policies in connection therewith . . .", the Arbitrator noted that Article XLII also states that "[t]hese prerogatives shall not abridge any term, provision, or condition of this Contract." App. 23a. Article XLVII specifies that part-time employees "shall work [on] a regular part-time scheduled basis . . . ." App. 22a.

The fact that the 1995 CBA did not give the Company the right to order the part-time employees to work overtime did not end the inquiry. The Arbitrator found that the part-time employees had failed to "adhere to the age old policy of 'continuing work and then grieve.'" App. 23a. He also noted that the Company had offered them the opportunity to return to work on March 2 and again on April 1, 1998. App. 24a. The part-time employees refused to do so, and the Arbitrator held that they were "not entitled to compensation except for the period commencing January 3, 1998, until March 2, 1998." App. 24a.

The Company sued to vacate the Award, and the Union counterclaimed for enforcement. Acting on cross-motions for summary judgment, the district court below declared that the 1995 CBA "clearly establishes Appalachian's right to require employees to work overtime." App. 16a. The district court below concluded that "[t]he arbitrator's decision to reinstate the discharged employees, after Appalachian exercised its rights under the agreement, must be reversed." App. 16a-17a.

The Union appealed, and the court of appeals below affirmed the district court's decision. After stating the principle that "[r]eview of an arbitrator's award is necessarily limited . . .", the court of appeals below turned to its four factor test for vacating arbitration awards, as follows:

> "(1) an award conflicts with express terms of the collective bargaining agreement . . . ;
>
> (2) an award imposes additional requirements that are not expressly provided in the agreement . . . ;
>
> (3) an award is without rational support or cannot be rationally derived from the terms of the agreement . . . ; and
>
> (4) an award is based on general considerations of fairness and equity instead of the precise terms of the agreement . . . . *See Cement Divs., Nat. Gypsum Co. v. United Steelworkers of America, et al.*, 793 F.2d 759, 766 (6th Cir. 1986)." (App. 6a) (citations omitted)

The court of appeals below held that Arbitrator Thomson's decision ran afoul of the first and second factors. App. 6a. Interpreting for itself the contractual overtime provisions as applying to part-time employees, the court of appeals below found a first factor violation, holding that "[t]he arbitrator was therefore wrong to conclude that there was no provision permitting ARH to direct its part-time workers to work overtime. . . ." App. 7a. (footnote omitted). Apparently in response to the dissent's view that the overtime provision was ambiguous, the court of appeals below also found a second factor violation, as follows:

> "Nevertheless, even if we were to credit the arbitrator's construction of the Agreement as against its conflict with express provisions, we would still have to vacate the award as it imports notions not found in the Agreement itself." App. 8a.

These improper "notions", the court of appeals below explained, were Arbitrator Thomson's assignment of controlling significance to the absence of a contractual provision that permitted the Company to require overtime work by regular part-time employees and to the absence of a contractual provision that permitted the Company to require an employee to work more than his or her regularly scheduled part-time hours. App. 8a. The court of appeals below held that Arbitrator Thomson's notions contradicted the management rights principles that "[t]he Agreement need not include provisions permitting management action on every conceivable employment matter; rather, on issues not discussed in the Agreement, management retains discretion." App. 8a. As support for its holding, the court of appeals below cited this Court's decision in *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). App. 8a. The court of appeals below vacated the Award because "[t]he arbitrator created a limitation on ARH's management rights that is not found in the Agreement . . . ." App. 9a (footnote omitted).

Judge Gilman dissented on the grounds that the majority "impermissibly replaces the arbitrator's construction of the Agreement", the contractual overtime, part-time employees and management rights clauses, "with its own interpretation." App. 13a. Moreover, Judge Gilman noted that the arbitrator's reinstatement remedy was explicitly authorized by Article XXXII which specifies that " 'the arbitrator shall have the authority to modify the penalty . . .' " App. 12a. Judge Gilman stated that he would reverse the decision of the district court below and reinstate the Arbitrator's Award. App. 14a.

REASONS FOR GRANTING THE PETITION

First, the court of appeals below decided this case without the benefit of the guidance provided by this Court's summary reversal of the Ninth Circuit's decision vacating an arbitra-

tion award in *Major League Baseball Players Association v. Garvey*, 532 U.S. ___ 69 U.S.L.W. 3725, 3726 (No. 00-1210, decided May 14, 2001) (per curiam) where this Court held:

> "Even when the arbitrator's award may properly be vacated, the appropriate remedy is to remand the case for further arbitration proceedings."

Vacating the Sixth Circuit's decision and remanding it for further consideration in light of *Garvey* may very well render unnecessary this Court's resolution of the reserved management rights issue. Moreover, even if Arbitrator Thomson was wrong in holding that the Company did not have the contractual right to order the part-time employees to work past their scheduled time, Arbitrator Thomson would still need to determine whether the discharge was for just cause, including whether the penalty fit the crime.

Second, the circuit courts are now split on the issue of whether the principle of reserved management rights is, as a matter of law, part of every collective bargaining agreement. Labor arbitrators have always differed on what weight, if any, to give to the principle of reserved management rights in interpreting labor agreements, but the arbitrators' differing views have heretofore been deferred to by the circuit courts as permissible contract interpretation. Imposing, judicially as a matter of law, the reserved management rights principle upon labor agreements usurps the arbitrator's contract interpretation function and threatens to undo the peaceful resolution of labor disputes through voluntary arbitration which Congress has established and this Court has fostered.

Third, this Court's recent decision in *Circuit City Stores Inc. v. Adams*, __ U.S. __, 69 U.S.L.W. 4195 (No. 99-1379, decided March 21, 2001) raises the question of whether this Court should harmonize Section 301 and Section 10(a) of the Arbitration Act by holding that the outside limit of a court's authority to vacate a labor arbitration award is set by the specific grounds listed in Section 10(a) of the Arbitration Act.

Section 10(a) lists only claims of serious misconduct by the parties or by the arbitrator, claims of a lack of procedural fairness which prejudice the rights of a party, and a claim of a lack of authority in the arbitrator and does not permit judicial review of the substantive merits of an arbitration award.

I. THE DECISION BY THE COURT OF APPEALS BELOW CONFLICTS SQUARELY WITH DECISIONS OF THE FIFTH, SEVENTH, NINTH AND TENTH CIRCUITS

The court of appeals below held that the Company possessed inherent or reserved management rights—"on issues not discussed in the Agreement, management retains discretion." App. 8a. Thus, under the view of the court of appeals below, when Arbitrator Thomson found that there was no contract provision permitting the Company to require an employee to work more than his or her regularly scheduled part-time hours, the Arbitrator was constrained to hold that the right to require such over-scheduled-time work was inherently reserved to the Company. Therefore, when Arbitrator Thomson relied on that contractual silence and the separate contractual article governing part-time employees to hold that the Company lacked the contractual authority to require the part-time employees to work over their regularly scheduled hours, the court of appeals below vacated the Award. App. 10a.

A management's rights argument quite similar to that adopted by the court of appeals below was rejected by the Fifth Circuit in enforcing an arbitration award in *National Gypsum Co. v. Chemical Workers*, 147 F.3d 399 (1998). In *National Gypsum*, the employer put into effect a schedule change "under which no employee would work more than six days in any week." 147 F.3d at 401. The schedule change resulted in substantial pay cuts because the employees had been working a seven-consecutive day schedule, earning time and a half on Saturday and double time on Sunday. 147 F.3d

at 401. The arbitrator held that the employer's unilateral change in scheduling violated its duty to bargain with the union which was derived from § 5, the contractual recognition clause. The employer argued that the arbitrator's award violated § 104, the management's rights clause, which reserved to management "'the right to . . . schedule and reschedule employees as required by the business needs and operations requirements . . . .'" 147 F.3d at 404. The arbitrator had "concluded that, although the provision gives management scheduling rights, it does not allow management to exercise those rights 'as a vehicle for the wholesale reduction of the wage bargain.'" 147 F.3d at 404. The arbitrator there, as Arbitrator Thomson did here, pointed to the fact that the labor agreement limited the scope of the management's rights clause by stating that it "may be 'expressly limited by the written terms of [the] Agreement.'" 147 F.3d at 405. The Fifth Circuit upheld the award, noting that the tension created between the wage provisions and the management's scheduling rights was a matter of contract interpretation for the arbitrator to resolve:

> "Without question, there is some tension between the arbitrator's construction of § 5 and the management rights clause. To the extent that § 5 and § 104 are in conflict, however, the arbitrator had the authority to resolve this conflict in favor of the Union. The arbitrator did not ignore § 104, but attempted to harmonize that provision with the bargaining requirement he found in § 5. The Company and the Union bargained for the arbitrator's interpretation of the Agreement, not ours. *See Enterprise Wheel*, 363 U.S. at 597, 80 S.Ct. at 1361. Because we cannot say that the arbitrator's decision did not 'concern[] the construction of the contract . . . ,' we must enforce it. *Id.* at 599, 80 S.Ct. at 1362." 147 F.3d at 405.

The Fifth Circuit also rejected an employer's management rights challenge to an arbitration panel's award that the

contracting out of yard work violated the labor agreement. *Folger Coffee v. Auto Workers, Local 1805*, 905 F.2d 108 (5th Cir. 1990). The only reference to contracting out was in the management rights clause which reserved to the employer all rights "*except those that are specifically given up or modified by the express written terms of the Agreement . . .*" and which stated that "[i]ncluded in the rights reserved to the Company . . . are . . . the *determination of the nature and extent of work*, if any, to be *contracted or transferred out* . . . ." 905 F.2d at 109n.3 (emphasis in the original). The arbitration panel reasoned that Folger's right to contract out was "not absolute" and that, because Folger's employees had necessary skills and tools to perform the work as they had in the past, Folger violated the seniority and recognition provisions of the labor agreement. 905 F.2d at 109. The Fifth Circuit enforced the award noting that "the arbitration panel in the instant case did not ignore the subcontracting provision . . . . They quoted it and commented upon its meaning." 905 F.2d 111-112.

Similarly, the Seventh Circuit enforced an arbitrator's subcontracting violation award in the face of a broad management rights clause in *Dreis & Krump Mfg. v. Machinists*, 802 F.2d 247 (7th Cir. 1986). The Seventh Circuit quoted the arbitrator's opinion rejecting "the company's argument that the management-rights provision 'negates any implied prohibition on subcontracting' . . ." 802 F.2d at 253. After noting that employer's counsel had abandoned that position at oral argument, the Seventh Circuit observed that "the agreement contains implied as well as express terms . . . and the implied terms may require that the management-rights provision be given a narrower scope than its language might suggest." 802 F.2d at 253 (citations omitted). The Seventh Circuit concluded "that the company's attack on the award was frivolous . . . ." 802 F.2d at 254. Relying upon the Seventh Circuit's reasoning in *Dreis & Krump*, the Tenth Circuit enforced an arbitrator's

subcontracting violation award in the face of a broad management-rights clause which provided that the employer "may 'subcontract work as deemed necessary or desirable,' . . . ." *NCR Corp., E&M-Wichita v. District Lodge 70, Machinists*, 906 F.2d 1499, 1504, 1506 (10th Cir. 1980).

In a case which is strikingly similar to this case, an arbitrator's award that an employer subcontracted work in violation of the labor agreement was enforced by the Ninth Circuit. *Edward Hines Lumber Co. v. Lumber & Sawmill Workers*, 764 F.2d 631 (9th Cir. 1985), *cert. denied*, 475 U.S. 1131 (1986). There, as here, "[n]o express provision prohibiting subcontracting exists in the Agreement." 764 F.2d at 635. There, as here, the agreement contained a very broad management rights clause. In fact, the *Edward Hines* management rights clause was even broader in that it reserved all management rights not "specifically abridged" by the labor agreement. 764 F.2d at 633n.1. There, "the arbitrator considered the reserved rights theory of management, but rejected it after reviewing the applicable authorities." 764 F.2d at 635. Unlike here, the *Edward Hines* arbitrator relied on the existence of a past practice of the employer maintaining a 60-40 ratio of employer to contractor work. However, the arbitrator also placed reliance on implied contractual rights, as Arbitrator Thomson did here, when he "found that other clauses, such as wages, recognition, union security, and seniority, taken together, constituted an implied covenant that the employer would not seriously erode the bargaining unit by subcontracting." 764 F.2d at 635. The Ninth Circuit noted that the district court, which had vacated the award, "appears to have disagreed with the conclusions and interpretations of the arbitrator." 764 F.2d at 635. "Given the policy of deferral to arbitration award, and the narrow standard to be applied permitting only of limited review by the court," the Ninth Circuit reversed the district court's decision and enforced the award. 764 F.2d at 635.

II. THE PETITION PRESENTS IMPORTANT QUESTION OF FEDERAL ARBITRATION LAW

The decisions of this Court concerning both commercial arbitration and labor arbitration have emphasized that parties will be held to their arbitration bargain as a matter of congressional policy. Initially, this was accomplished with respect to labor arbitration by holding that Section 301 was the source of substantive law, to be "fashion[ed] from the policy of our national labor laws," which governs labor agreements and their arbitration provisions. *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456 (1957). Labor arbitration was then separated from commercial arbitration and the hostility which the federal courts had accorded to commercial arbitration. Finally, this Court noted that, while arbitration is a matter of contract, "to be consistent with congressional policy in favor of settlement of disputes by the parties through the machinery of arbitration, the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made." *United Steelworkers v. Warrior & Gulf N. Co.*, 363 U.S. 574, 582 (1960). "Doubts should be resolved in favor of coverage . . . ." 363 U.S. at 583 (footnote omitted).

The path followed with respect to commercial arbitration has closely paralleled that of labor arbitration. In *Moses H. Cone Memorial Hospital v. Mercury Const.*, 460 U.S. 1 (1983), this Court noted that the Arbitration Act "create[s] a body of federal substantive law of arbitrability . . .", that "Section 2 is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary . . .", and that "[t]he Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ." 460

U.S. at 24-25. In *Southland Corp. v. Keating*, 465 U.S. 1 (1984), this Court held that the Arbitration Act preempts state statutes which undercut the enforceability of agreements to arbitrate. 465 U.S. at 16. Finally, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), this Court held that statutory claims were subject to the same contractual test of arbitrability—"the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." 473 U.S. at 626.

This Court has yet to consider the standard for enforcing commercial arbitration awards under Section 10(a) of the Arbitration Act. However, this Court has established a very narrow standard of judicial review of labor arbitration awards which excludes entirely judicial review of the merits of an award. In the *Steelworkers Trilogy*, this Court emphasized that "[t]he refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements . . ." and that "the courts have no business overruling [the arbitrator] because their interpretation of the contract is different from his." *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596, 599 (1960). Again, under *Warrior & Gulf*, "the judicial inquiry under § 301 must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator power to make the award he made." 363 U.S. at 582.

The decision of the court of appeals below threatens to unravel the very fabric of the comprehensive policy which Congress has selected and this Court has woven to hold parties to their arbitration bargain. The court of appeals below did not merely engage in impermissible contract interpretation; it went much further by defining the very nature of collective bargaining agreements as premised upon the reserved management rights theory. It declared that "[t]he Agreement need not include provisions permitting management action on every conceivable employment matter;

rather, on issues not discussed in the Agreement, management retains discretion." App. 8a. For support, it cited not to the language of the management rights clause of the 1995 CBA, but to this Court's decision in *Warrior & Gulf*. App. 8a. Thus, the court of appeals below decided a matter of law, not a contract interpretation matter.

The decision is pernicious because it strikes at the very heart of a labor arbitrator's interpretive function by removing from the arbitrator's consideration whether a labor agreement contains implied, as well as express obligations. Arbitrators differ widely on the nature of management rights; indeed, Arbitrator Charles C. Killingsworth, the outgoing President of the National Academy of Arbitrators in 1969, described these differing arbitral views as "the long-smoldering controversy about management's reserved rights versus implied obligations under a collective bargaining agreement." C. Killingsworth, "*The Presidential Address: Management Rights Revisited*", Proceedings of the 22nd Annual Meeting of the National Academy of Arbitrators 1 (BNA, 1970). An equivalent action in commercial arbitration would be for a federal court to declare that all Automobile Sales contracts, entered into which affect commerce, are premised on the principle of *caveat emptor* and then to vacate a commercial arbitration award which had held that the seller had violated an implied obligation of good faith and fair dealing. In both instances, the federal court would, by defining the nature of the agreement, be usurping the role of the arbitrator as the bargained-for interpreter of the agreement.

The time has come for this Court to harmonize the "draws its essence" test for labor arbitration awards under Section 301 with the Arbitration Act's grounds for vacating arbitration awards contained in Section 10(a). *See*, S. Hayford, *Unification of the Law of Labor Arbitration and Commercial Arbitration: An Idea Whose Time Has Come*, 52 Baylor L. Rev. 781 (2000). This Court's recent decision in

Circuit City, that the Arbitration Act applies to all contracts of employment except for workers directly employed in interstate commerce, removed the last impediment to holding the Arbitration Act applicable to collective bargaining agreements. However, because this Court held in *Lincoln Mills* that Section 301 governs collective bargaining agreements and their arbitration provisions, this Court should harmonize the two statutes. Section 10(a) permits an arbitration award to be vacated only upon a showing of serious misconduct by the other party or by the arbitrator, of a lack of procedural fairness which is prejudicial to the moving party, or of a lack of authority in the arbitrator. None of these statutory grounds permits a court to interpret the agreement concerning the merits of the dispute and would rule out the four-factor test for vacating awards applied by the court of appeals below.[2] This case presents this Court with the opportunity to harmonize Section 301 and Section 10(a) by holding that Section 10(a) sets the outside limits beyond which the federal judiciary may not go in vacating an award and permits no judicial review of the award's contractual merit whatsoever.

Finally, the decision of the court of appeals below conflicts directly with this Court's subsequent *Garvey* decision. In *Garvey*, this Court emphasized that it means it when it says "[c]ourts are not authorized to review the arbitrator's decision on the merits . . . "; this Court held that "[e]ven when the arbitrator's award may properly be vacated, the appropriate remedy is to remand the case for further arbitration proceedings." 69 U.S.L.W. at 3725. Here, remand was especially appropriate because even if Arbitrator Thomson

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[2] Standing on its head the solicitude which this Court showed for labor arbitration in the *Steelworkers Trilogy*, the court of appeals below applies to commercial arbitration awards not the expansive four-factor test applied here, but the Section 10(a) factors construed very narrowly. *Federated Dept. Stores v. J.V.B. Industries*, 894 F.2d 862 (6th Cir. 1990).

was wrong in holding that the Company lacked the contractual right to require part-time employees to work over their scheduled times, he still needed to decide whether the penalty of discharge fits the crime under the contractual just cause for discharge provision. Indeed, the 1995 CBA states explicitly that, in a discharge case, "the arbitrator shall have the authority to modify the penalty . . . ." App. __ a.

Thus, if this petition for certiorari had been pending at the time *Garvey* was decided, this Court would have summarily vacated the decision of the court of appeals below and remanded the case for reconsideration in light of *Garvey*. The fact that *Garvey* was not decided until May 14, 2001, four days *after* the court of appeals below denied the petition for rehearing, suggests the same summary treatment is appropriate here.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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Dated: August 8, 2001

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 99-6590

APPALACHIAN REGIONAL HEALTHCARE, INC.,
Plaintiff-Appellee,

v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
LOCAL 14398, and UNITED STEELWORKERS OF AMERICA,
Defendants-Appellants.

Appeal from the United States District Court
for the Eastern District of Kentucky at Frankfort
No. 99-00007—Joseph M. Hood, District Judge

Argued: November 3, 2000
Decided and Filed: March 29, 2001

OPINION

KRUPANSKY, Circuit Judge. Defendant-Appellants the United Steelworkers of America, AFL-CIO-CLC, Local 14398, and the United Steelworkers of America (collectively, the "Union") challenge an award of summary judgment vacating an arbitrator's award which had required the reinstatement of three discharged employees at Plaintiff-Appellee Appalachian Regional Healthcare, Inc. ("ARH").

ARH, a not-for-profit charitable corporation under the laws of Kentucky, operates several hospitals and healthcare facilities in eastern Kentucky and West Virginia, including a hospital located in South Williamson, Kentucky, where the relevant events transpired. The Union represents certain

ARH employees at the South Williamson hospital including Chris Adkins, Steven Mahon and Lamar Thomas ("Grievants"), who contend that ARH violated the Collective Bargaining Agreement ("Agreement") by discharging them.

On December 30, 1997, Grievants were to work from 4:30 P.M. to 8:30 P.M., their normal shift as part-time workers in ARH's laundry room. Shortly before 8:20 P.M., the foreman ordered[1] the Grievants to "stay on their machines" beyond 8:30 P.M. Without offering a reason as to why they would not remain, Grievants refused and left the worksite. Grievants received a Written Record of Verbal Warning the next day. They were charged with violating the Code of Ethics[2] and leaving the worksite in contravention of a direct order to remain. Grievants did not challenge this disciplinary decision. On January 2, 1998, the Grievants were again ordered to work beyond 8:30 P.M. Again they refused without offering a reason as to why they would not remain. Grievants were suspended by letter dated January 5, 1998. On January 8, 1998, they were discharged for insubordination in violation of the Code of Ethics. Pursuant to the Agreement, the dispute was submitted to an arbitrator, W. Scott Thompson, who was mutually selected by the parties.

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[1] Before the arbitrator, the Union contended that ARH's supervisors did not issue a direct order. The arbitrator found that ARH's supervisors indeed had issued direct orders and the Union does not challenge that finding here.

[2] The Code of Ethics provides in part:

> (3) *Violations of the Code of Ethics*
>
> The following acts are considered appropriate reasons for disciplinary action, however, these acts are obviously not all the reasons the Corporation may deem cause for disciplinary action.
>
> a. Disregard of or refusal to comply with Corporate and/or facility policies, practices, proper orders and instructions from duly authorized supervisory employees.

On October 13, 1998, the arbitrator heard testimony and accepted evidence concerning the employment dispute. On December 11, 1998, the arbitrator issued an opinion and award, finding that "Grievants shall be returned to work with all rights of seniority and benefits" and that "Grievants shall receive compensation for the period January 3, 1998, to March 2, 1998. They shall not receive compensation of any kind for the period March 2, 1998, until reinstatement to employment."[3]

In support of his judgment, the arbitrator found that the Agreement classified employees as either full-time or part-time employees.[4] While there is a provision governing mandatory overtime for full-time employees,[5] no provision is

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[3] The arbitrator found that the Grievants were offered the opportunity to return to work and refused, thereby failing to mitigate damages. The arbitrator therefore limited the amount of backpay to which the Grievants were entitled.

[4] Article XLVII of the Agreement ("Part-Time Employees") provides:

> The term "regularly employed part-time Employee" refers to persons who regularly work a number of hours and days a week which are less than the customary full forty (40) hour work week. Such persons shall be considered as regular, part-time Employees and shall customarily work on a regular part-time scheduled basis. All such employees shall enjoy proportionate holiday, vacation and sick leave benefits based upon the actual number of straight time hours worked per pay period.

[5] Article XV of the Agreement ("Hours of Work and Work Week") provides:

> Section A. The basic work day for all Employees under this Article shall be eight (8) hours per day. The basic work week for said Employees shall be forty (40) hours per week. The work week shall begin with the first shift on Monday, which is sometimes referred to as the "C" shift.
>
> Section B. Hours worked in excess of the basic work day (8 hours) or the basic work week (40 hours) shall be paid at the rate of time and one-half the regular straight time rate. Overtime payments, payable under the foregoing overtime policies, shall not be

made for mandatory overtime for part-time employees. This omission was significant. The arbitrator concluded, "I have examined the Collective Bargaining Agreement thoroughly. I find no Contract provision which permits the employer to arbitrarily require 'overtime' work by regular part-time employees in addition to their regularly scheduled hours of work."

ARH filed a complaint in the Eastern District of Kentucky on February 4, 1999, alleging that the arbitrator "ignor[ed] express, unambiguous provisions of the Agreement retaining to ARH all management rights to 'direct[] the work force'[6]

> pyramided. Overtime payments for the week shall be made under whichever policy allows the greater amount of such pay.
>
> . . .
>
> Section D. Employees shall be expected to work overtime when requested, however, the Hospital shall endeavor, insofar as may be practicable, to make an equitable distribution of overtime among the qualified Employees within a job classification. An Employee will not be disciplined for refusing to work overtime who has good and sufficient cause for so refusing to work overtime.
>
> Section E. The provisions of this Article are intended only to provide a basis for determining the number of hours of work for which an Employee shall be entitled to be paid at overtime rates and shall not be construed as a guarantee to such Employee of any specified number of hours of work either per day or per pay period or as limiting the right of the Hospital to fix the number of hours of work, including overtime, either per day or per pay period, for such Employee.

[6] Section A of Article XLII of the Agreement ("Management Rights") provides:

> Management of the Hospital includes the rights among others of hiring, discharging, and directing the working force, and of establishing reasonable policies in connection therewith, and all management rights are vested exclusively in the Hospital and shall not be abridged by the Union. However, these prerogatives shall not be used to discriminate against any member of the Union and

and 'fix the number of hours of work'[7] [.]" On November 2, 1999, on motion for summary judgment by ARH, the lower court held that "[a] collective bargaining agreement need not lay out specific guidelines that indicate what an employer is 'permitted' to do by contract to manage its business or direct its workforce; rather, it is free to manage except as specifically prohibited by a collective bargaining agreement." It then vacated the arbitral award. The Union timely appealed on November 24, 1999.

We review the district court's decision to award summary judgment to ARH *de novo*. *See Electrical Workers Local 58 Pension Trust Fund v. Gary's Elec. Service Co.*, 227 F.3d 646 (6th Cir. 2000). No dispute as to a material fact exists.

Review of an arbitrator's award is necessarily limited. A reviewing court will not replace an arbitrator's construction of the Agreement with its own interpretation. "The Supreme Court has made clear . . . that courts must accord an arbitrator's decision substantial deference because it is the arbitrator's construction of the agreement, not the court's construction, to which the parties have agreed." *Beacon Journal Publishing Co. v. Akron Newspaper Guild, Local 7*, 114 F.3d 596, 599 (6th Cir. 1997). But the arbitrator's construction must "draw[] its essence from the collective bargaining agreement" rather than serve the arbitrator's "own brand of industrial justice." *United Steelworkers of Am. v. Enterprise Wheel & Car Co.*, 363 U.S. 593, 597 (1960).

This court has vacated arbitral awards in four types of cases:

> (1) an award conflicts with express terms of the collective bargaining agreement, *see, e.g., Grand Rapids Die Casting Corp. v. Local Union No. 159, U.A.W.*, 684 F.2d 413 (6th Cir.1982);

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any policy shall not abridge any term, provisions or condition of this contract.

[7] *See* note 4 *supra* (Article XV, Section E).

(2) an award imposes additional requirements that are not expressly provided in the agreement, *see, e.g., Sears, Roebuck & Co. v. Teamsters Local Union No. 243*, 683 F.2d 154 (6th Cir.1982), *cert. denied*, 460 U.S. 1023, 103 S.Ct. 1274, 75 L.Ed.2d 495 (1983);

(3) an award is without rational support or cannot be rationally derived from the terms of the agreement, *see, e.g., Timken Co. v. United Steelworkers of America*, 482 F.2d 1012 (6th Cir.1973); and

(4) an award is based on general considerations of fairness and equity instead of the precise terms of the agreement, *see, e.g., Local 342, United Auto Workers v. T.R.W., Inc.*, 402 F.2d 727 (6th Cir.1968), *cert. denied*, 395 U.S. 910, 89 S.Ct. 1742, 23 L.Ed.2d 223 (1969).

See Cement Divs., Nat. Gypsum Co. v. United Steelworkers of Am., et al., 793 F.2d 759, 766 (6th Cir. 1986). In addition, Article XXXIII, § K of the Agreement specifically provides that an arbitrator "shall have no power to add to, subtract from, or modify in any way, any terms of the Agreement, nor shall he exercise any responsibility or function of the Hospital."

In the instant case, as observed by the district court, the arbitrator's decision conflicts with express provisions in the Agreement and imposes requirements on ARH which do not flow from the Agreement itself. The Agreement explicitly reserves to management the power to direct the work force and fix the number of hours of work to the management.[8]

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[8] The Union argues that these provisions do not specifically permit ARH to require part-time employees to work beyond their regularly scheduled shifts. First, this argument ignores the express requirement in Article XV, which allows ARH to fix the number of hours its employees work overtime. Second, insofar as Article XV does not accord ARH the relevant authority, the management rights to direct its workforce and fix the number of hours are particular enough to support ARH's orders to work overtime.

Moreover, in Article XV, the Agreement expressly provides that "[e]mployees shall be expected to work overtime when requested [unless good cause is shown]."

The Union argues that Article XV does not apply to part-time workers as Section A of the article indicates that "[t]he basic work day for *all Employees under this Article* shall be eight (8) hours per day. The basic work week for said Employees shall be forty (40) hours per week." Agreement, Article XV, Section A (emphasis added). The Union contends that part-time workers have a reduced work schedule so this article must not apply to them. The Union's contention is unavailing. Section E of Article XV indicates that "[t]he provisions of this Article are intended only to provide a basis for determining the number of hours of work for which an Employee shall be entitled to be paid at overtime rates and shall not be construed as a guarantee to such Employee of any specified number of hours of work either per day or per pay period or as limiting the right of the Hospital to fix the number of hours of work, including overtime, either per day or per pay period, for such Employee." Read in the light of Section E, Section A's "all Employees *under* this Article" (emphasis added) does not restrict the universe of employees which are subject to its requirements, but rather limits the effect of those requirements to determining overtime pay. The arbitrator was therefore wrong to conclude that there was no provision permitting ARH to direct its part-time workers to work overtime.[9] The arbitrator's construction of the Agreement

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[9] Relevant in this regard is Article XLVII which classifies part-time employees. It indicates that "part-time Employees . . . shall *customarily* work on a regular part-time scheduled basis." (emphasis added). This phrasing highlights the management's right to expand on the normal workshift for part-time employees.

conflicts with express provisions and therefore fails to draw its essence from the Agreement.[10]

Nevertheless, even if we were to credit the arbitrator's construction of the Agreement as against its conflict with express provisions, we would still have to vacate the award as it imports notions not found in the Agreement itself. The arbitrator makes this error clear in his opinion accompanying the judgment:

> I find no Contract provision which *permits* the Employer to arbitrarily require "overtime" work by regular part-time employees in addition to their regularly scheduled hours of work. Article XV, Section B, only mandates "overtime" work when employees are requested to work in excess of eight hours per day. There is no provision *permitting* the Employer to require an employee to work more than their regularly scheduled part-time hours. Article XLII only permits the Employer to direct the working force and of establishing reasonable policies in connection therewith. These prerogatives shall not abridge any term, provision, or condition of this Contract.

Arbitral Award, slip op. at 7 (emphasis added). The Agreement need not include provisions permitting management action on every conceivable employment matter; rather, on issues not discussed in the Agreement, management retains discretion. *See United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960) ("Collective bargaining

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[10] The Union argues that the Agreement gave the arbitrator the power to "modify the penalty" in discharge cases. Agreement, Article XXXII, § C ("In the event a grievance or discharge goes to arbitration, the arbitrator shall have the authority to modify the penalty[.]"). The Union asserts that the arbitrator merely modified the employment termination. However, even a cursory review of the arbitrator's opinion demonstrates that the arbitrator determined that ARH was without authority to discipline the Grievants-the Union's post hoc contention notwithstanding.

agreements regulate or restrict the exercise of management functions; they do not oust management from the performance of them. Management hires and fires, pays and promotes, supervises and plans. All these are part of its function, and absent a collective bargaining agreement, it may be exercised freely except as limited by public law and by the willingness of employees to work under the particular, unilaterally imposed conditions.").[11] The arbitrator created a limitation on ARH's management rights that is not found in the Agreement.[12] In so doing, the arbitrator's decision failed to draw its essence from the Agreement.[13]

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[11] The Union cites to a different passage in *Warrior & Gulf*, contending that the case eviscerated the doctrine that management rights were paramount when not specifically abrogated by the collective bargaining agreement:

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished.

Warrior & Gulf, 363 U.S. at 581-82. This passage does not bear the weight of the Union's argument. As quoted in the text accompanying this footnote, which immediately follows the above-quoted passage, the *Warrior & Gulf* Court did not abrogate management rights. In addition, the past practices of ARH and industry behavior did not inform the arbitrator in his resolution of the issue and the Union did not submit any evidence to this court of past practices or industry behavior to support its claims.

[12] "When a collective bargaining agreement prohibits the addition of contract terms, the arbitrator may not proceed to do so." *International*

For the foregoing reasons, the lower court's award of summary judgment is AFFIRMED.

DISSENT

RONALD LEE GILMAN, Circuit Judge, dissenting. I fully agree with the majority's articulation of the proper standard for reviewing the arbitrator's award, i.e., that "[a] reviewing court will not replace an arbitrator's construction of the Agreement with its own interpretation." Slip Op. at 6. Unfortunately, however, I am convinced that this is precisely what the majority has done.

The majority purports to vacate the arbitrator's award on two grounds: (1) that the award conflicts with the express terms of the collective bargaining agreement (CBA), and (2) that the award imposes additional requirements that are not expressly provided for in the agreement. To the contrary, I am of the opinion that the award is in full accord with the CBA and based on a reasonable interpretation of its express terms. I would therefore reverse the ruling of the district court and reinstate the arbitrator's award.

In determining that the award conflicts with the express terms of the CBA, the majority finds that the agreement recognizes the hospital's right to require overtime of all its employees and to fix the number of hours in the work week. Article XV of the CBA, however, upon which the majority

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Brotherhood of Electrical Workers v. Thomas & Betts Corp., 182 F.3d 469, 472 (6th Cir. 1999). The Agreement expressly prohibits the arbitrator from "add[ing] to, subtract[ing] from, or modify[ing] in any way, any terms of the Agreement[.]" Agreement, Article XXXIII, § K.

[13] ARH contends that the arbitrator's decision was in contravention of Kentucky public policy. As we vacate the decision on other grounds, we do not reach this issue.

relies, is ambiguous as to whether it applies to all employees or only to full-time employees. The key terms of Article XV provide as follows:

> Section A. The basic work day for all Employees *under this Article* shall be eight (8) hours per day. The basic work week for said Employees shall be forty (40) hours per week. . . .
>
> Section D. Employees shall be expected to work overtime when requested, however, the Hospital shall endeavor, insofar as may be practicable, to make an equitable distribution of overtime among the qualified Employees within a job classification. An Employee will not be disciplined for refusing to work overtime who has good and sufficient cause for so refusing to work overtime.

(Emphasis added.)

Although Section D of Article XV *could be* interpreted as allowing the hospital to require overtime work for all of its employees, both full-time and part-time, I believe that the more reasonable interpretation (and the one adopted by the arbitrator) is that Section D applies only to full-time employees covered by Article XV. There is, after all, a separate Article XLVII governing part-time employees. Article XLVII is comprised of four sections covering such topics as scheduling, job benefits, and ability to post for vacancies, none of which mention overtime work.

Such ambiguity, I believe, requires this court to uphold the arbitrator's award. When examining an arbitration award under facts "not explicitly covered" by an agreement, a court may disagree with the arbitrator's interpretation, but may not reject the interpretation so long as it is "one of several rational interpretations." *Dallas & Mavis Forwarding Co. v. Gen. Drivers, Warehousemen & Helpers, Local Union No. 89*, 972 F.2d 129, 135 (6th Cir. 1992) (upholding an

arbitrator's determination that the employer violated the CBA by refusing to merge its seniority list with that of another employer, even though other interpretations were possible). In the present case, the arbitrator's remedy of reinstating the employees does not appear to conflict with any provision of the CBA.

Article XXXII of the CBA, in fact, explicitly provides that "[i]n the event a grievance concerning suspension or discharge goes to arbitration, the arbitrator shall have the authority to modify the penalty, and the Hospital and the Union agree to in all respects comply with the award of the Arbitrator." That is exactly what the arbitrator did in the present case, and the hospital should be bound to accept the result. I would therefore defer to the determination of the arbitrator that the hospital's authority to compel overtime work applies only to full-time employees. *See Int'l Ass'n of Machinists & Aerospace Workers v. Tenn. Valley Auth.*, 155 F.3d 767 (6th Cir. 1998) (upholding an arbitrator's order requiring the Tennessee Valley Authority to create a bargaining unit for hourly employees, despite an existing agreement allowing outsourcing that arguably applied to these employees).

The majority also holds, in my view erroneously, that the arbitrator's order to reinstate the three employees impermissibly restricts the management rights of the hospital in a manner not expressly provided for by the agreement. *See* Slip Op. at 10-11. This case, however, involves an issue upon which the Agreement has spoken. Article XLII of the CBA provides as follows:

> [T]he rights, among others, of hiring, discharging, and directing the working force, and of establishing reasonable policies in connection therewith, and all management rights are vested exclusively in the Hospital. However, these prerogatives shall not be used to discriminate against any member of the Union and

> any policy *shall not abridge any term, provisions or condition of this contract.*

(Emphasis added.) The terms of the contract itself, therefore, limit the hospital's management rights to those that are in accordance with the other articles of the agreement.

Consequently, the arbitrator did not impose any additional requirements not expressly provided for in the agreement. The arbitrator, in fact, clearly acknowledged that he could not add to, subtract from, or modify the agreement. Rather, he examined the other articles of the agreement to determine that the CBA did not grant the hospital the right to compel its part-time employees to work overtime. The arbitrator reached this conclusion by interpreting Article XV as providing the hospital with the authority to request only full-time employees, and not part-time employees, to perform overtime work. Because I believe that the arbitrator had a sound basis for this conclusion, the hospital did not have the "just cause" necessary to terminate Adkins, Mahon, and Thomas under Article XXXII, Section A, of the CBA (governing discharge).

Indeed, additional articles of the CBA establish that the hospital does not have the unfettered right to hire or fire its employees. Article X, Section D, for example, provides the bases for awarding various jobs to applicants depending on the grade of the employment openings. Similarly, Article XXXII restricts the hospital from preemptorily discharging its workers, and instead requires an initial suspension pending a hearing. In light of these articles, the arbitrator reasonably interpreted Articles XV and XLVII as circumscribing the termination rights available to the hospital under Article XXXII.

The majority's opinion, therefore, impermissibly replaces the arbitrator's construction of the Agreement with its own interpretation. *See Beacon Journal Publ'g Co. v. Akron Newspaper Guild, Local Number 7*, 114 F.3d 596, 599 (6th

Cir. 1997). Here, the arbitrator recognized that Article XLII gave the hospital the general authority to direct its workforce. But he interpreted this authority as not including the right to terminate part-time workers for refusing to perform unscheduled overtime work. Because the arbitration award was based on a reasonable interpretation of ambiguous contractual provisions, we are required to defer to the determination of the arbitrator. *See United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) (stating that "[i]t is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.").

For all of the reasons set forth above, I would reverse the decision of the district court and reinstate the award of the arbitrator.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

[Filed Nov 02, 1999]

Civil Action No. 99-7

APPALACHIAN REGIONAL HEALTHCARE, INC.,
Plaintiff,

v.

UNITED STEELWORKERS OF AMERICA, AFK-CIO-CLC,
and LOCAL 14398,
Defendants.

MEMORANDUM OPINION AND ORDER

Before the Court is the motion of the plaintiff, Appalachian Regional Healthcare, Inc. ("Appalachian"), for summary judgment pursuant to Fed. R. Civ. P. 56 (b) [Record No.9]. The Defendants have filed a response [Record No. 12] to which the Plaintiff has replied [Record No. 14]. In addition, Defendant, United Steelworkers of America, has filed a motion for summary judgment [Record No. 11] to which the Plaintiff has responded (Record No. 14]. The time for reply has lapsed. The Court Being sufficiently advised, this matter is ripe for review.

FACTUAL BACKGROUND

Three employees were discharged from Appalachian for insubordination and violation of Appalachian's Code of Ethics after the employees repeatedly walked off the job when told to work overtime. The defendants, the United Steel Workers of America, AFL-CIO-CLC, and its Local 14398,

represented the three employees during arbitration. The arbitration award ordered the reinstatement of the three discharged employees. However, because the award clearly failed to draw its essence from the collective bargaining agreement, it must be vacated.

DISCUSSION

Article XXXIII, Section K of the collective bargaining agreement between Appalachian and its employees states that any arbitrator selected by the parties to hear a grievance "shall have no power to add to, subtract from, or modify in any way, any terms of the Agreement, nor shall he exercise any responsibility or function of the Hospital."

Additionally, in Article XLII the collective bargaining agreement gives the hospital management rights including the powers of "hiring, discharging, and directing the working force, and of establishing reasonable policies in connection therewith, and all management rights are vested exclusively in the Hospital." Section E of Article XV of this agreement gives Appalachian the power to

> "provide a basis for determining the number of hours of work for which an employee shall be entitled to be paid at overtime rates and shall not be construed as a guarantee to such employee of any specific number of hours of work either per day or per pay period or as limiting the right of the Hospital to fix the number of hours of work, including overtime, either per day or per pay period, for such employee."

The collective bargaining agreement clearly establishes Appalachian's right to require employees to work overtime. This insures that patients are not put at risk when a particular shift is understaffed. The rights to management of employee's work schedules is unambiguously vested in Appalachian under this agreement. The arbitrator's decision to reinstate the discharged employees, after Appalachian exercised its rights under the agreement, must be reversed.

Case law establishes that, when an arbitrator's award fails to "draw [] its essence from the collective bargaining agreement", the award must be vacated. *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 596-97 (1960). In the case at bar, "the arbitrator is confined to the interpretation and application of the collective bargaining agreement, and although he may construe ambiguous contract language, he is without authority to disregard or modify plain and unambiguous provisions." *Dobbs, Inc. v. Local 614, Internat'l Bhd of Teamsters*, 813 F.2d 85, 86 (6th Cir. 1987) (citations omitted).

A collective bargaining agreement need not lay out specific guidelines that indicate what an employer is "permitted" to do by contract to manage its business or direct its workforce; rather, it is free to manage except as specifically prohibited by a collective bargaining agreement. *United Steelworkers v. Warrior & Gulf navigation Co.*, 363 U. S .574, 583 (1960). Case law, and the collective bargaining agreement itself, clearly indicate that Appalachian was within its rights to discharge breaching employees. The plaintiff should not be subject to an arbitrator's award altering the collective bargaining agreement. Therefore, pursuant to 29 U.S.C. § 185, the arbitrator's award will be vacated and Appalachian is no longer required to reinstate the discharged employees in this matter.

Accordingly, IT IS ORDERED

(1) That the plaintiff's motion for summary judgment be, and the same hereby is, GRANTED;

(2) That the arbitrator's decision challenged herein be, and the same hereby is, VACATED.

This the 2nd day of November, 1999.

/s/ Joseph M. Hood
JOSEPH M. HOOD, Judge

Date of Entry and Service:

APPENDIX C

ARBITRATION OPINION AND AWARD

Grievance No. 98-14398-2

In the Matter of Arbitration Between:

APPALACHIAN REGIONAL HEALTHCARE, INC.,

and

UNITED STEELWORKERS OF AMERICA AFL-CIO-CLC

Grievance of:
Chris Adkins
Steven Mahon
Lamar Thomas

* * * *

APPEARANCES:

For the Employer — David J. Lang
Vice President and Chief
Employee Support Officer
Appalachian Regional Healthcare
1220 Harrodsburg Road
P.O. Box 8086
Lexington, Kentucky 40533

For the Union: — Carlton R. "Carl" Hall
Staff Representative
Sub District Office
United Steelworkers of America
205 E. Reynolds Road—Suite E
Lexington, Kentucky 40517

ARBITRATOR: W. Scott Thomson, P.O. Box 22268, Louisville, Kentucky 40252-0268.

By the terms of the Agreement between Appalachian Regional Healthcare, Inc., hereinafter called "the Employer," and United Steelworkers of America, AFL-CIO-CLC, hereinafter referred to as "the Union," disputes between the parties are to be settled in accord with the grievance and arbitration procedure therein provided. Pursuant to such procedure W. Scott Thomson was selected by the parties by mutual choice as arbitrator to hear a matter concerning discharge. A Hearing was held October 13, 1998, at the Appalachian Regional Hospital, South Williamson, Kentucky, in which full and equal opportunity was afforded the parties to make statements and argument, introduce evidence, and examine and cross-examine witnesses. Post-Hearing Briefs were submitted.

CONTRACT PROVISIONS

Joint Exhibit #1.

ARTICLE XV
HOURS OF WORK AND WORK WEEK

. . . .

Section D. Employees shall be expected to work overtime when requested, however, the Hospital shall endeavor, insofar as may be practicable, to make an equitable distribution of overtime among the qualified Employees within a job classification. An Employee will not be disciplined for refusing to work overtime who has good and sufficient cause for so refusing to work overtime.

ARTICLE XLIV
SCOPE OF AGREEMENT

. . . .

Section D. No policy established by the Hospital in connection with the exercise of its managements rights shall abridge any terms, provisions or conditions of this Agreement insofar as this Agreement regulates rates of pay, hours of work and conditions of employment.

ARTICLE XLV
SEVERABILITY

Should any Article of this Agreement or any Section or Provision hereof violate any applicable law, such Article or Section or Provision hereof shall be inoperative to the extent that it is at variance with such law. All Agreement shall not be affected and shall remain in full force and effect. The parties shall meet forthwith to renegotiate any such inoperative Article or Section or provision hereof to comply with the law.

Joint Exhibit #2.

I. CODE OF ETHICS

. . . .

3 Violations of The Code of Ethics:

The following acts are considered appropriate reasons for disciplinary action, however, these acts are obviously not all the reasons the Corporation may deem cause for disciplinary action.

a. Disregard of or refusal to comply with Corporate and/or facility policies, practices, proper orders and instructions from duly authorized supervisory employees.

ISSUE

Whether the Employer had just cause to discharge Grievants?

OPINION

December 30, 1997, Grievants were scheduled to work 4:30 p.m. to 8:30 p.m. This was their regular assigned shift of work. They were regular part-time employees who customarily worked on a regular part-time scheduled basis. Larry Tackett was their foreman. Shortly before 8:20 p.m., Tackett instructed Grievants they were to work overtime and to "stay

on their machines." Additional "overtime" work was required. Similar instructions were issued to eleven other employees.

At the end of their regular shift (8:30 p.m.), Grievants left their work area. Tackett inquired where they were "going." An argument ensued with Grievants' questioning Tackett's authority to request they work "overtime," work past their scheduled hours. After a few moments Tackett instructed the Grievants to simply "go on." Grievants then left the laundry area. They did not return.

The next day Grievants' received a Written Record of Verbal Warning. They were charged with a violation of the "Code of Ethics." They were charged with leaving their work area having been instructed to remain at work. No grievance was filed.

January 2, 1998, Grievants were again scheduled to work four hours, 4:30 p.m. to 8:30 p.m. Tim Adkins was their immediate supervisor on this occasion. Adkins determined that additional work was required. He instructed Grievants to remain at their work place for additional work. They were offered the option of going on meal break at 8:30 p.m., or simply take a fifteen minute "rest." They chose the latter. All other employees were requested to work additional time.

After a break, Adkins returned to his office where the Grievants were then located. They informed Adkins they had paged their Union representative and were awaiting his arrival. Grievants again were directed to work. The Union representative did not arrive at the laundry area until 9:15 p.m. Between 8:30 p.m. and 9:15 p.m. Grievants performed no work. The Union Representative inquired of Adkins whether Grievants could go home. Adkins responded affirmatively. Grievants were notified of their suspension by letter dated January 5, 1998. January 8, 1998, their suspension was converted to discharge. The offense cited was

insubordination in violation of the Code of Ethics. Grievants did not offer a reason why they could not stay past 8:30 p.m.

The Union proffers that no direct order to work was issued to Grievants. This is inapposite with established facts. A direct order to continue work was issued on both occasions. However, they were to be paid at the straight time rate of compensation.

Article XLVII, Section A, defines a regular part-time employee. It refers to persons who regularly work a number of hours and days a week which are less than the customary full forty (40) hour workweek. Such persons shall be considered as regular part-time employees and shall work a regular part-time scheduled basis. As a regular part-time employee they are entitled to proportionate holiday, vacation, and sick leave benefits based upon the actual number of straight time hours worked per pay period.

The Collective Bargaining Agreement in Article XIV, Section D, permits the Employer to reduce an employee's hours whenever economic or other business related reasons dictate. This is not to constitute a layoff. A reduction of hours may include an individual employee or group of employees. This is consistent with Article XV which provides that the basic workday for all employees under this Article shall be eight hours per day. The basic workweek for employees shall be forty (40) hours per week. Thus, the Contract provides for two types employees, (1) regular full time employees, and (2) regular part-time employees.

Section B. Hours worked in excess of the basic work day (8 hours) or the basic workweek (40 hours) shall be paid at the rate of time and one-half the regular straight time rate. "Overtime" payments for the week shall be made under whichever policy allows the greater amount of such pay.

Section D. Employees shall be expected to work "overtime" when requested. However, the hospital shall

endeavor, insofar as may be practicable, to make an equitable distribution of overtime among qualified employees within a job classification. An employee will not be disciplined for refusing to work "overtime" who has good and sufficient cause for refusing to work overtime. This shall not be construed as a guarantee to such employee of any specific number of hours of work either per day or per pay period or as limiting the right of the hospital to fix the number of hours of work, including "overtime," either per day or per pay period, for an employee.

I have examined the Collective Bargaining Agreement thoroughly. I find no Contract provision which permits the Employer to arbitrarily require "overtime" work by regular part-time employees in addition to their regularly scheduled hours of work. Article XV, Section B, only mandates "overtime" work when employees are requested to work in excess of eight hours per day. There is no provision permitting the Employer to require an employee to work more than their regular scheduled part-time hours. Article XLII only permits the Employer to direct the working force and of establishing reasonable policies in connection therewith. These prerogatives shall not abridge any term, provision, or condition of this Contract. It must be emphasized that the Arbitrator shall have no power to add to, subtract from, or modify in anyway, any terms of this Agreement.

There is no doubt, however, that Grievants, in part, contributed to this matter. Article XXXIII, Section B, provides: In the event of a grievance there shall be no work stoppages or strikes. An employee having a grievance (or the Union) shall take it up with his immediate supervisor specifying that the matter is a formal grievance. It is clear that Grievants did not adhere to the age old policy of "continuing work and then grieve." Commencing on page 1 of the Collective Bargaining Agreement it states that it is the intent

and purpose of the parties that this Agreement shall set forth the agreements of the parties hereto in respect to rates of pay, hours of work, and conditions of employment to be observed by ARH, the Union and employees. It is to provide procedures for the equitable adjustment of grievances to prevent . . . interruption of work, work stoppages, . . . or other interferences with the work of the healthcare entities during the life of the Agreement, and to promote harmonious relations between ARH, its employees and the Union. They are to encourage the highest possible degree of friendly, cooperative relationship between all employees. This goal depends primarily on attitudes between people in their respective organizations and at all levels of responsibilities. Proper attitude must be based on full understanding of and regard for the respective rights and responsibilities of both ARH and the Union. This demands fairness and understanding.

Grievants were offered the opportunity to return to work March 2, 1998, and, again April 1, 1998. They chose not to return to work. Thus, Grievants are not entitled to compensation except for the period commencing January 3, 1998, until March 2, 1998.

AWARD

1. Grievants shall be returned to work with all rights of seniority and benefits.

2. Grievants shall receive compensation for the period January 3, 1998, to March 2, 1998. They shall not receive compensation of any kind for the period March 2, 1998, until reinstatement to employment.

/s/ W. Scott Thomson
W. SCOTT THOMSON
Arbitrator.

Date: December 11, 1998

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

[Filed May 10, 2001]

No. 99-6590

APPALACHIAN REGIONAL HEALTHCARE, INC.,
Plaintiff-Appellee,

v.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, LOCAL 14398, *et al.*,
Defendants-Appellants.

ORDER

BEFORE: KRUPANSKY, BATCHELDER, AND GILMAN,
Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Gilman would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN, Clerk

APPENDIX E

AGREEMENT

THIS AGREEMENT, made and entered into by and between APPALACHIAN REGIONAL HOSPITALS, INC., with offices at 1220 Harrodsburg Road, Lexington, Kentucky 40533, and its successors, hereinafter designated as the "Hospital," and the UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, with its offices at 5 Gateway Center, Pittsburgh, Pennsylvania 15222, and its successors, hereinafter referred to as the "Union" . . . ."

ARTICLE III

RECOGNITION OF THE UNION

Section A. The Hospital voluntarily recognizes the Union as the sole and exclusive collective bargaining representative for the Employees, as hereinafter defined, of the Hospital at its 11 regional hospitals . . . ."

Section B. The bargaining unit includes only the full-time and regularly employed part-time maintenance, service, LPN, clerical, and technical employees including those at the locations listed in Section A, and those listed in Appendix A and shall specifically exclude, among others, the following . . . ."

ARTICLE XV

HOURS OF WORK AND WORK WEEK

Section A. The basic work day for all Employees under this Article shall be eight (8) hours per day. The basic work week for said Employees shall be forty (40) hours per week. The work week shall begin with the first shift on Monday, which is sometimes referred to as the "C" shift.

Section B. Hours worked in excess of the basic work day (8 hours) or the basic work week (40 hours) shall be paid at the rate of time and one-half the regular straight time rate.

Overtime payments, payable under the foregoing overtime policies, shall not be pyramided. Overtime payments for the week shall be made under whichever policy allows the greater amount of such pay.

. . . .

Section D. Employees shall be expected to work overtime when requested, however, the Hospital shall endeavor, insofar as may be practicable, to make an equitable distribution of overtime among the qualified Employees within a job classification. An Employee will not be disciplined for refusing to work overtime who has good and sufficient cause for so refusing to work overtime.

Section E. The provisions of this Article are intended only to provide a basis for determining the number of hours of work for which an Employee shall be entitled to be paid at overtime rates and shall not be construed as a guarantee to such Employee of any specified number of hours of work either per day or per pay period or as limiting the right of the Hospital to fix the number of hours of work, including overtime, either per day or per pay period, for such Employee.

. . . .

ARTICLE XXXII

SUSPENSION AND DISCHARGE CASES

. . . .

Section C. In the event a grievance concerning suspension or discharge goes to arbitration, the arbitrator shall have the authority to modify the penalty, and the Hospital and the Union agree to in all respects comply with the award of the Arbitrator.

ARTICLE XXXIII

GRIEVANCE AND ARBITRATION PROCEDURE

Section A. A grievance is defined as a dispute or complaint concerning the interpretation, application or compliance with, any provision of this Agreement, arising out of this Agreement between the Hospital and the Union, or Employee.

Section B. In the event of a grievance, there shall be no work stoppages or strikes, and the following procedures shall be observed to resolve a grievance:

. . . .

Section G. If the grievance is not settled in Step 4, and if written demand is made by the Union, then within ten (10) working days after written demand for arbitration, an arbitrator will be selected from a permanent panel of ten (10) arbitrators mutually agreed to by the Hospital and the Union. . . .

. . . .

Section J. The award of the arbitrator shall be final, conclusive and binding upon the Hospital, the Union, and the Employee(s).

Section K. The arbitrator shall have jurisdiction only over disputes or complaints involving the interpretation or application of, or compliance with, the terms of this agreement, and he shall have no power to add to, subtract from, or modify in any way, any terms of the Agreement, nor shall he exercise any responsibility or function of the Hospital or the Union, nor shall he have jurisdiction over any dispute or complaint involving any practice of the Hospital unless it is contended that such practice abridges a provision of the Agreement. The parties to this Agreement shall make a sincere effort to resolve any complaint or problem even though it does not involve the interpretation, application or compliance with the provisions of this Agreement.

ARTICLE XLII

MANAGEMENT RIGHTS

Section A. Management of the Hospital includes the rights among others of hiring, discharging, and directing the working force, and of establishing reasonable policies in connection therewith, and all management rights are vested exclusively in the Hospital and shall not be abridged by the Union. However, these prerogatives shall not be used to discriminate against any member of the Union and any policy shall not abridge any term, provisions or condition of this contract.

ARTICLE XLVI

DURATION

This Agreement shall terminate at the expiration of ninety (90) days after either party shall give written notice of termination to the other party but in any event shall not be terminated earlier than April 1, 1998 at 12:01 a.m. If either party gives such notice, the parties shall meet within thirty (30) days thereafter to negotiate.

ARTICLE XLVII

PART TIME EMPLOYEES

Section A.

The term "regularly employed part-time Employee" refers to persons who regularly work a number of hours and days a week which are less than the customary full forty (40) hour work week. Such persons shall be considered as regular, part-time Employees and shall customarily work on a regular part-time scheduled basis. All such employees shall enjoy proportionate holiday, vacation and sick leave benefits based upon the actual number of straight time hours worked per pay period.

Section B.

Part-Time employees hired after April 1, 1986 will share in the cost of medical benefits insurance premiums. The proportionate amount paid by the Hospital will be based upon the actual number of straight time hours worked, adjusted on a quarterly basis.

Section C.

Experience gained by part-time employees in their part-time positions cannot be used to qualify them for posted job vacancies over full-time bidders for the position.

Section D.

Full-time employees who are displaced to part-time status shall be allocated Additional Vacation Pay at the full-time rate.

Supreme Court, U.S.
FILED
AUG 7 2001
CLERK

No. 01-239

In The

Supreme Court of the United States

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, and UNITED STEELWORKERS OF AMERICA, LOCAL 14398,

Petitioners,

v.

APPALACHIAN REGIONAL HEALTHCARE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

I. Should a petition for a writ of certiorari be denied when the decision of the Court of Appeals below, following well-established law upon which there is no circuit split, merely affirmed the vacatur of a labor arbitration award because the arbitrator ignored the plain language of the governing collective bargaining agreement and instead imported the arbitrator's own notions of industrial justice, thereby failing to draw the essence of the arbitration award from the collective bargaining agreement?

CORPORATE DISCLOSURE STATEMENT

Appalachian Regional Healthcare, Inc. has no parent corporation, nor do any publicly-held companies own ten percent or more of the stock of Appalachian Regional Healthcare, Inc.

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STATEMENT OF THE CASE

This matter was a routine case involving a labor arbitration award (the "Award") that was vacated because it patently failed to "draw its essence" from the governing collective bargaining agreement. Applying long-established, consistently-followed law as set forth by this Court, the district court and the court of appeals below properly vacated the Award pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) ("Section 301"), because the arbitrator ignored the plain language of the collective bargaining agreement between the parties (the "Agreement") and instead imported the arbitrator's own notions of industrial justice, thereby failing to draw the essence of the Award from the Agreement. The Union's attempt in its Petition for a Writ of Certiorari to inject new and irrelevant issues into what has been a relatively simple and straightforward proceeding should be rejected.

A. THE GRIEVANTS WERE DISCHARGED AFTER THEY REPEATEDLY REFUSED DIRECT ORDERS TO CONTINUE WORKING PAST THE END OF THEIR REGULAR SHIFT.

The relevant facts were uncomplicated and undisputed. Respondent Appalachian Regional Healthcare, Inc. ("ARH" or "the Hospital"), a not-for-profit charitable corporation under the laws of the Commonwealth of Kentucky, operates several hospitals and health care facilities in eastern Kentucky and West Virginia, including a hospital located in South Williamson, Kentucky, where

the relevant events transpired. (Pet. App. at 1a) Petitioners, the United Steelworkers of America, AFL-CIO-CLC, and its Local 14398 (collectively, the "Union"), represent certain ARH employees at the South Williamson hospital pursuant to a collective bargaining agreement (the "Agreement") governing the terms and conditions of employment for employees in the bargaining unit. (*Id.* at 1a-2a, 26a-30a)

On December 30, 1997, three bargaining unit employees, Chris Adkins, Steven Mahon and Lamar Thomas (the "Grievants"), who had been scheduled to work their usual part-time shift from 4:30 p.m. to 8:30 p.m., refused a supervisor's direct order to "stay on their machines" beyond 8:30 p.m. (Pet. App. at 2a) Without offering a reason as to why they would not remain, the Grievants refused and walked off the job. (*Id.*) The Grievants received a "Written Record of Verbal Warning" the next day for insubordination and violation of ARH's Code of Ethics. The Grievants did not challenge this discipline. (*Id.*)

Less than a week later, on January 2, 1998, a Hospital supervisor again instructed the Grievants to continue working past 8:30 p.m. based on the supervisor's determination that "additional work was required." (Pet. App. at 2a, 21a) The Grievants again refused their supervisor's instruction and walked off the job without offering any excuse or reason as to why they did not wish to work past the end of their regularly-scheduled shift. (*Id.*) The Hospital subsequently suspended and, on January 8, 1998, terminated the Grievants for insubordination and violation of ARH's "Code of Ethics" for abandoning their

jobs in disregard of a direct order from their supervisor. (*Id.*)

Each of the three Grievants subsequently filed a grievance over his discharge and, pursuant to the grievance and arbitration procedures of the Agreement, the matters jointly proceeded to arbitration on October 13, 1998. (Pet. App. at 2a-3a)

B. THE RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT.

Article XLII of the Agreement, entitled "Management Rights," states that "Management of the Hospital includes the rights, among others, of hiring, discharging, and **directing the working force**, and of establishing reasonable policies in connection therewith, and **all management rights are vested exclusively in the Hospital** and shall not be abridged by the Union. However, . . . any [management] policy shall not abridge any term, provision or condition of this contract." (Pet. App. at 29a) (emphasis added). Thus, by the plain language of the Agreement, ARH reserved all management rights except as specifically limited by a particular term of the Agreement.

Article XV of the Agreement, "Hours of Work and Work Week," which sets forth bargaining unit employees' entitlement to overtime pay, establishes in Section A that the "basic work day" for all employees shall be eight hours per day and the "basic work week" shall be 40 hours per week, and continues in Section B that "[h]ours worked in excess of the basic work day (8 hours) or the basic work week (40 hours) shall be paid at the rate of

time and one-half the regular straight time rate." (Pet. App. at 26a-27a) Section E of Article XV reinforces the management rights provision cited above by emphasizing the parties' understanding that: "The provisions of this Article are intended only to provide a basis for determining the number of hours of work for which an Employee shall be entitled to be paid at overtime rates and shall not be construed as a guarantee to such Employee of any specific number of hours of work either per day or per pay period or as limiting the right of the Hospital to fix the number of hours of work, including overtime, either per day or per pay period, for such Employee." (*Id.* at 27a) Section D of Article XV further plainly states that "Employees shall be expected to work overtime when requested . . . . " (*Id.*)

Article XXXIII of the Agreement provides a grievance and arbitration procedure to address disputes or complaints concerning the interpretation or application of the contract's provisions. (Pet. App. at 28a) Article XXXIII, Section K of the Agreement specifically states that an arbitrator selected by the parties to hear a grievance "shall have no power to add to, subtract from, or modify in any way, any terms of the Agreement, nor shall he exercise any responsibility or function of the Hospital . . . . " (*Id.*)

C. THE ARBITRATION AWARD IGNORED EXPLICIT CONTRACT PROVISIONS AND IMPOSED LIMITATIONS UPON THE HOSPITAL WHICH WERE NOT AGREED UPON BY THE PARTIES TO THE AGREEMENT. THE DISTRICT COURT AND THE SIXTH CIRCUIT COURT OF APPEALS PROPERLY VACATED THE AWARD BECAUSE IT IMPOSED THE ARBITRATOR'S "OWN BRAND OF INDUSTRIAL JUSTICE" RATHER THAN INTERPRETING THE PARTIES' AGREEMENT.

The arbitration hearing primarily revolved around the factual dispute of whether or not the Grievants had been given a direct order to continue working past the end of their shift. In the Award, issued on December 11, 1998, the arbitrator explicitly rejected the Union's contention that the Grievants had been confused about whether they were to stay on the job or could go home, finding that "[a] direct order to continue [to] work was issued on both occasions." (Pet. App. at 2a, n. 1, 22a) Neither this nor any other factual determination by the arbitrator has ever been challenged by either party. The arbitrator nonetheless ignored the express, unambiguous provisions of the Agreement set forth above, which recognize that ARH retained all management rights to "direct[ ] the work force" and "fix the number of hours of work," and sustained the grievances, ordering the Hospital to reinstate the three Grievants with back pay on the sole basis that "[t]here is no provision permitting the Employer to require an employee to work more than their [*sic*] regular scheduled part-time hours." (*Id.* at 24a)

On February 4, 1999, the Hospital filed a complaint to vacate the arbitrator's decision pursuant to Section 301 of

the Labor Management Relations Act, 29 U.S.C. § 185(a), in the United States District Court for the Eastern District of Kentucky. (Pet. App. at 4a) The Union counterclaimed for enforcement of the Award. Following briefing on cross motions for summary judgment, the district court granted the Hospital's motion on November 2, 1999, finding that the Award failed to draw its essence from the Agreement because:

> The collective bargaining agreement clearly establishes Appalachian's right to require employees to work overtime. This insures that patients are not put at risk when a particular shift is understaffed. The rights to management of employees' work schedules is unambiguously vested in Appalachian under this Agreement. The arbitrator's decision to reinstate the discharged employees, after Appalachian exercised its rights under the agreement, must be reversed.

(Pet. App. at 16a) Noting the basic principles, long-ago articulated by this Court, that arbitrators are without authority to disregard or modify plain and unambiguous contract provisions (both as a matter of law and under the specific language of Article XXXIII, Section K of the Agreement here), and that a collective bargaining agreement need not lay out specific guidelines that indicate what an employer is "permitted" to do to manage its business or direct its workforce, but rather an employer is free to manage except as specifically prohibited by a collective bargaining agreement (again, both as a general proposition and pursuant to the specific language of Article XLII of the Agreement), the district court ruled that ARH "should not be subject to an arbitrator's award

altering the collective bargaining agreement." (*Id.* at 17a; *see also,* Pet. App. at 28a-29a)

The United States Court of Appeals for the Sixth Circuit affirmed. Properly noting that "[r]eview of an arbitrator's award is necessarily limited" and that a "reviewing court will not replace an arbitrator's construction of the Agreement with its own interpretation," the Sixth Circuit found that the Award was properly vacated because rather than *interpreting* the terms of the Agreement, the arbitrator *ignored* them. (Pet. App. at 5a-7a) While heeding this Court's admonition that "courts must accord an arbitrator's decision substantial deference because it is the arbitrator's construction of the agreement, not the court's construction, to which the parties have agreed," the Sixth Circuit found that the Award failed to "draw[ ] its essence from the collective bargaining agreement" and rather "serve[d] the arbitrator's 'own brand of industrial justice' " because it "conflict[ed] with express terms of the collective bargaining agreement" and "impose[d] additional requirements that are not expressly provided in the agreement." (*Id., citing United Steelworkers of America v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597 (1960). In summary:

> The arbitrator created a limitation on ARH's management rights that is not found in the Agreement. In doing so, the arbitrator's decision failed to draw its essence from the Agreement.

(*Id.* at 9a) The Sixth Circuit subsequently denied the Union's petition for a rehearing *en banc* on May 10, 2001. (*Id.* at 25a)

REASONS FOR DENYING THE PETITION

A. THE ARBITRATION AWARD WAS PROPERLY VACATED IN ACCORDANCE WITH CLEAR LEGAL PRECEDENT ESTABLISHED BY THIS COURT. RATHER THAN INTERPRETING THE TERMS OF THE GOVERNING COLLECTIVE BARGAINING AGREEMENT, THE ARBITRATOR IGNORED ITS PLAIN LANGUAGE AND INSTEAD IMPOSED HIS OWN BRAND OF INDUSTRIAL JUSTICE, THEREBY FAILING TO DRAW THE ESSENCE OF THE AWARD FROM THE AGREEMENT.

Vacatur of the arbitrator's Award in this matter was proper and correct under the well-established, undisputable legal principles articulated by this Court. A labor arbitration award must be vacated under Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a), when the award fails to "draw its essence" from the controlling collective bargaining agreement but instead dispenses the arbitrator's "own brand of industrial justice." *Enterprise Wheel, supra*, 363 U.S. at 596-97. An award fails to draw its essence from the labor agreement when the arbitrator "ignore[s] the plain language of the contract." *United Paperworkers Internat'l Union v. Misco, Inc.*, 484 U.S. 29, 38 (1987). There is no conflict among the circuit courts of appeals on this universally recognized standard. Because the lower courts merely applied these long established principles to the Award at issue, no important purpose would be served by this Court granting the Union's Petition here.

Judicial review of an arbitrator's award is of course limited. "As long as the arbitrator's award 'draws its

essence from the collective bargaining agreement,' and is not merely 'his own brand of industrial justice,' the award is legitimate." *Misco, supra,* 484 U.S. at 36, *citing Enterprise Wheel, supra,* 363 U.S. at 597; *see also, Eastern Associated Coal Corp. v. United Mine Workers of America, District 17,* 531 U.S. 57, 62 (2000). Accordingly, the Sixth Circuit in its decision below correctly recognized that: "Review of an arbitrator's award is necessarily limited. A reviewing court will not replace an arbitrator's construction of the Agreement with its own interpretation." (Pet. App. at 5a)

Nevertheless, it is the arbitrator's interpretation *of the agreement* for which the parties have bargained, and thus, "[t]he arbitrator may not ignore the plain language of the contract." *Misco, supra,* 484 U.S. at 36, *citing Enterprise Wheel, supra,* 363 U.S. at 599. *See also, Dobbs, Inc. v. Local 614, Internat'l Bhd of Teamsters,* 813 F.2d 85, 86 (6th Cir. 1987) ("the arbitrator is confined to the interpretation and application of the collective bargaining agreement, and although he may construe ambiguous contract language, he is without authority to disregard or modify plain and unambiguous provisions.") (citations omitted). Moreover, the governing Agreement itself specifically provides that an arbitrator selected by the parties to hear a grievance "shall have no power to add to, subtract from, or modify in any way, any terms of the Agreement, nor shall he exercise any responsibility or function of the Hospital . . . . ". *See* Article XXXIII, Section K (Pet. App. at 28a).[1]

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[1] The Union has emphasized in its Petition that judicial inquiry under Section 301 must be strictly confined to the question of whether the parties "agree[d] to give the arbitrator

In the instant matter, the Award was properly vacated because, first, the arbitrator imported a new limitation which is nowhere contained in the Agreement for which the parties had bargained. The Agreement explicitly preserves to the Hospital *all* management rights except as limited by another term of the Agreement. *See* Article XLII, Section A (Pet. App. at 29a). Neither the arbitrator nor the Union ever pointed to any provision anywhere in the Agreement limiting the Hospital's otherwise exclusive management rights with respect to part-time employees.[2] In fact, there is no such limitation. Therefore, the Award was properly vacated because instead of following the plain language of the Agreement, it invented a new, conflicting provision.

The arbitrator's failure to follow the plain language of the Agreement is highlighted by his clearly fallacious reasoning that because "there is no provision *permitting*

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the power to make the award he made." (Petition at 13, 14, *quoting United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960)). The Hospital heartily agrees and, as discussed herein, it is patent that the arbitrator here exceeded his powers because he ignored the plain language of the Agreement. The series of cases that the Union went on to cite, however, such as *Moses H. Cone Memorial Hospital v. Mercury Construction*, 460 U.S. 1 (1983), *Southland Corp. v. Keating*, 465 U.S. 1 (1984), and *Mitsubishi Motor Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985), all dealt with the issue of arbitrability, *i.e.*, whether a particular grievance fell within the scope of an arbitration provision. Because arbitrability has never been an issue in the instant proceedings, such cases are wholly inapposite here.

[2] Nor did the arbitrator or the Union identify any past practice, custom, or external law creating any such limitation.

the employer to require an employee to work more than their regular[ly] scheduled part-time hours," the Hospital is therefore *prohibited* from doing so. (Pet. App. at 23a) This backwards conclusion failed to draw its essence from the Agreement for at least two independent reasons.

First, this conclusion was premised upon a fundamentally flawed notion – that an employer must be expressly "given" the power, through a provision of a collective bargaining agreement, to direct its employees when to work. It is a bedrock principle of labor law that an employer inherently begins with *all* rights of management and is free to operate its business and manage, direct and schedule its employees *except as otherwise limited* by the governing collective bargaining agreement, past practice or external law. *Warrior & Gulf, supra,* 363 U.S. at 583; *see also, United States Steel Corp. v. Nichols,* 229 F.2d 396, 399 (6th Cir. 1956). In *Warrior & Gulf,* this Court recognized that:

> Collective bargaining agreements regulate or restrict the exercise of management functions; they do not oust management from the performance of them. **Management hires and fires, pays and promotes, supervises and plans. All of these are part of its function, and absent a collective bargaining agreement, it may be exercised freely** except as limited by public law and by the willingness of employees to work under the particular unilaterally imposed conditions.

Id., 363 U.S. at 583 (emphasis added).[3]

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[3] In the proceedings before the lower courts, the Union disputed this long-established principle that employers begin

Second – and more importantly, for purposes of the instant proceeding – even assuming, *arguendo*, that an employer does not have any inherent ownership right to manage its business and direct its employees, as the Union illogically continues to argue, there is in this case an explicit provision of the Agreement – Article XLII, Section A – which unequivocally confirms that "all management rights are vested exclusively in the Hospital," specifically stating that such rights include "directing the working force." (Pet. App. at 29a)

Faced with this explicit contractual reservation of all management rights to the Hospital, the Union below sought to justify the arbitrator's award as "contract interpretation" by relying upon the qualifying limitation in the same provision which states that "any [management] policy shall not abridge any term, provisions or condition of this contract." (*Id.*) The fatal flaw in this argument is that the Agreement contains no limiting "term, provision

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with all rights to direct and manage their business – basically just the inherent rights of ownership – and the corollary that, upon recognition of a labor union, all such rights remain with the employer except as specifically limited or delegated in the collective bargaining agreement. Not surprisingly, the Union cited no authority in support of its argument. The Union did quote, out of context, language from *Warrior & Gulf* that simply recognized that the "past practice" of the workplace may also, in addition to the specific provisions of the contract, create limitations on an employer's pre-existing management rights, and therefore the grievance at issue in *Warrior & Gulf*, involving contracting out, was considered *arbitrable*. *Id.*, 363 U.S. at 581-83. That principle, with which the Hospital has no quarrel, is irrelevant here because the Award did not purport to rest its conclusion that the Hospital lacked the right to set its employees' hours upon any past practice.)

or condition" stating that the Hospital may *not* direct part-time employees to continue working beyond the conclusion of their regularly-scheduled shift. In the absence of such a provision, the arbitrator acted beyond his authority in unilaterally creating one in derogation of plain contract language prohibiting him from doing so. Tellingly, the Award did not purport to cite any existing provision of the Agreement (nor any "past practice") as the source of the supposed limit on the Hospital's right to set the hours its employees work and otherwise direct its workforce. To the contrary, the arbitrator imported his assumption that such a limitation existed unless the Agreement affirmatively stated otherwise. The Award therefore created an extra-contractual limitation in violation of the plain language of the Agreement, which is exactly what an arbitrator may not do both under governing Section 301 law and under Article XXXIII, Section K of this particular Agreement.

The Award also disregarded and directly contradicted several other express terms included by the parties in the Agreement. Specifically, Article XV, Section D of the Agreement plainly recognizes that "Employees shall be expected to work overtime when requested," and Section E of that same Article provides that:

> **The provisions of this Article are intended *only* to provide a basis for determining the number of hours of work for which an Employee shall be entitled to be paid at overtime rates and shall not be construed as** a guarantee to such Employee of any specified number of hours of work either per day or per pay period or as **limiting the right of the Hospital to fix the number of hours of work, including**

> **overtime, either per day or per pay period**, for such Employee.

(Pet. App. at 27a) (emphasis added). The arbitrator provided no "interpretation" of these unambiguous provisions, but rather simply ignored their clear commands. Thus, it was the exact words of Article XV – not the lower courts' substitution of their own "contract interpretation" for that of the arbitrator, as the Union mistakenly contends – which squarely prohibited the arbitrator's implicit finding (and the Union's explicit argument below) that the "purpose" of Article XV was to "authorize" the Hospital to require "overtime" work, but only for full-time employees. Although Article XV twice explicitly acknowledges the Hospital's existing right to require overtime, that right plainly originates not from Article XV itself (as Section E makes clear) but rather from (a) all employers' inherent management rights and/or (b) Article XLII's specific reservation of same.[4]

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[4] To the extent that the Award was, as the Union argued below, purportedly based on Article XV's overtime (pay) provisions, it also failed to draw its essence from the Agreement because it directly conflicted with terms that are expressly contained therein. In addition to the Hospital's inherent and contractual exclusive right to direct the workforce discussed above, Article XV, Section E of the Agreement explicitly references "**the right of the Hospital to fix the number of hours of work . . . either per day or per pay period** . . . . " (Pet. App. at 27a) The provision does not state that such right is limited in any way. Had the Hospital ever agreed to exclude part-time employees from the reach of its expansive right to direct and schedule its employees, it seems safe to assume that the Union certainly would have insisted on including that limitation in this provision.

The Union argues in its Petition that the court of appeals' decision below is "pernicious" because it "remov[es] from the arbitrator's consideration whether a labor agreement contains implied, as well as express[,] obligations." (Petition at 15) This is simply wrong. The point is, the arbitrator here never identified *any* restrictions, express or implied, on the Hospital's management rights to direct and schedule its workforce (be those rights inherent or as reserved by the express provisions of the Agreement). Furthermore, even supposing, *arguendo*, that the arbitrator had relied on some sort of unidentified "implied" obligation, the Award still was properly vacated because this hypothetical "implied" provision would squarely conflict with the express, unambiguous terms actually set forth in the Agreement as discussed above. The arbitrator's decision to ignore these unambiguous provisions of the Agreement exceeded the express limits placed on his authority in Article XXXIII, Section K of the Agreement, which states that an arbitrator selected by the parties to hear a grievance "shall have no power to add to, subtract from, or modify in any way, any terms of the Agreement, nor shall he exercise any responsibility or function of the Hospital . . . . " (Pet. App. at 28a) The Award therefore was correctly vacated in accordance with the undisputed governing legal principles.

B. REMAND TO THE ARBITRATOR FOR FURTHER PROCEEDINGS IS UNNECESSARY BECAUSE THE COURT BELOW DID NOT REPLACE THE ARBITRATOR'S FACTUAL DETERMINATIONS WITH ITS OWN OR DIRECT JUDGMENT FOR THE HOSPITAL, BUT RATHER SIMPLY VACATED THE ARBITRATOR'S AWARD.

In addition to the legal correctness of the lower courts' decisions based on well-established and non-controversial legal principles, the Petition for a Writ of Certiorari should also be denied because none of the three questions the Union purports to present has any bearing on the issues that actually have been involved in this matter. The questions the Union has presented in its Petition are red herrings having little or nothing to do with the mundane issues actually decided below. None of the questions the Union presents is pertinent to, let alone determinative of, the challenged decisions.

First, the Union urges the Court to reverse and remand the lower court's decision based on the Court's recent *per curiam* decision in *Major League Baseball Players Association v. Garvey*, 532 U.S. ___, 149 L.Ed.2d 740, 121 S.Ct. 1724 (2001). ARH respectfully submits that *Garvey* does not require such action, which would be a pointless waste of judicial resources. In *Garvey*, unlike here, the court of appeals rejected a labor arbitrator's factual findings, particularly those with respect to credibility, and improperly substituted its own resolution of those disputed factual issues for the arbitrator's:

> The substance of the Court's discussion reveals that it overturned the arbitrator's decision

> because it disagreed with the arbitrator's factual findings, particularly those with respect to credibility. The Court of Appeals, it appears, would have credited Smith's 1996 letter, and found the arbitrator's refusal to do so at worst "irrational" and at best "bizarre." But even "serious error" on the arbitrator's part does not justify overturning his decision, where, as here, he is construing a contract and acting within the scope of his authority.

Id., 121 S.Ct. at 1728, *quoting Misco, supra*, 484 U.S. at 38. Again referencing *Misco*, the Court emphasized that "the arbitrator's 'improvident, even silly, factfinding' does not provide a basis for a reviewing court to refuse to enforce the award." *Id.* The Court therefore found the Ninth Circuit's substitution of its own factual conclusions, and direction of judgment in favor of Garvey rather than remanding to the arbitrator for further factfinding, improper under controlling Supreme Court precedent. *Id.* at 1729, *quoting Misco, supra*, 484 U.S. at 40-41, n. 10.

In the instant matter, by contrast, the arbitrator neither construed the Agreement nor acted within the scope of his limited authority under the Agreement's plain language. Nor did the lower courts merely substitute their judgment for that of the arbitrator. Moreover, the court of appeals neither displaced the arbitrator's factual findings nor directed judgment in favor of ARH; rather, it merely vacated the Award, precisely as the *Garvey* Court directed. *Id.* at 1728 ("the court should 'simply vacate the award, thus leaving open the possibility of further proceedings if they are permitted under the terms of the agreement.' ") (*citing Misco, supra*, 484 U.S. at 40-41, n. 10). The Union here never sought "further proceedings,"

nor has it identified any contractual basis for permitting such proceedings. In fact, there was and is no use for such proceedings because, unlike in *Garvey*, the court of appeals did not dispute the arbitrator's findings of fact but rather vacated the Award for ignoring the plain language of the Agreement and exceeding the arbitrator's expressly limited powers thereunder. ARH thus respectfully submits that *Garvey* does not require reversal or remand here.

C. NO PURPOSE WOULD BE SERVED BY THE COURT GRANTING THE PETITION ON THE INHERENT MANAGEMENT RIGHTS QUESTION PRESENTED BY THE UNION BECAUSE THE COLLECTIVE BARGAINING AGREEMENT ITSELF EXPRESSLY RESERVED ALL MANAGEMENT RIGHTS TO THE HOSPITAL EXCEPT AS OTHERWISE LIMITED BY A SPECIFIC TERM OF THE CONTRACT.

The Union next argues that "the circuit courts are now split on the issue of whether the principle of reserved management rights is, as a matter of law, part of every collective bargaining agreement." (Petition at 8) The five cases cited by the Union (Petition at 9-12) provide no support for this assertion. In the first place, none of the decisions cited truly involved the issue of "inherent" management rights. Rather, as here, the cited decisions all involved an arbitrator's interpretation of an express management rights clause contained in a collective bargaining agreement. Unlike in the case at bar, however, in each of the cases cited, the arbitrator found

either (a) an explicit written provision of the labor contract or (b) a past practice of sufficient consistency and longevity, that limited the employer's management rights as set forth in the particular contractual clause.[5] Here, on the other hand, the arbitrator never identified any contract provision (or past practice or external legal requirement) that limited the Hospital's express contractual right to direct the work force and schedule its employees as it determined necessary on a day to day basis.

In *National Gypsum Co. v. Chemical Workers*, 147 F.3d 399 (5th Cir. 1998), for example, which involved the issue of whether the employer had a contractual duty to bargain with the union over a scheduling change (from seven day work weeks to a maximum of six days, which reduced the amounts of overtime earned by bargaining unit members), neither the arbitrator nor the court even addressed – let alone denied the existence of – the "inherent" management rights of the company. The arbitrator merely stated, uncontroversially, that management rights are not boundless, but may be "expressly limited by the written terms of [the] Agreement." *Id.* at 405.[6] The

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[5] Incidentally, the courts of appeals in all of the cases cited by the Union applied the same standard of review as did the Sixth Circuit here. *See, e.g., National Gypsum Co. v. Chemical Workers*, 147 F.3d 399, 403 (5th Cir. 1998) ("arbitral action contrary to express contractual provisions will not be respected;" "If the arbitrator ignores or refuses to apply a contractual provision that permitted the Company's action, 'the arbitrator exceed[s] the express limitations of his contractual mandate.' ").

[6] ARH has no quarrel with this proposition, nor with the related concept that a past practice, if sufficiently consistent, agreed upon and long-standing, may be considered part of the

arbitrator in *National Gypsum* then found, however, unlike here, that there were certain specific sections of the contract, as well certain provisions of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(d), that imposed upon the employer a duty to bargain with the union over rules changes substantially affecting the terms and conditions of work. *Id.* at 403-04. The court affirmed the arbitrator's decision because – again, unlike here – the arbitrator based his decision on the written terms of the agreement: "[t]he arbitrator went to considerable lengths to explain how his conclusion was grounded in the text of the agreement." *Id.* at 404.

All of the other decisions the Union cited involved the contracting out of bargaining unit work, a discrete area which directly involves the dictates of the NLRA. *See Folger Coffee Co. v. United Auto Workers, Local 1805*, 905 F.2d 108, 111 (5th Cir. 1990); *Dreis & Krump Mfg. Co. v. Internat'l Ass'n of Machinists & Aerospace Workers*, 802 F.2d 247, 253-54 (7th Cir. 1986); *NCR Corp., E&M-Wichita v. Internat'l Ass'n of Machinists & Aerospace Workers*, 906 F.2d 1499, 1501-02 (10th Cir. 1980); *Edward Hines Lumber Co. v. Lumber & Sawmill Workers*, 764 F.2d 631, 633 (9th Cir. 1985). Like *National Gypsum, supra*, moreover, none of these cases involved inherent management rights but dealt instead with the extent to which either other contract provisions, the NLRA, or established past practice limited the company's management rights as reserved by

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collective bargaining agreement. As noted above, however, neither of these principles come into play here because the arbitrator identified no such contract term or past practice supporting his decision.

a contract provision. *See Folger Coffee, supra,* 905 F.2d at 111 (because, pursuant to the NLRA, subcontracting cannot undermine the continued existence or strength of a recognized bargaining unit, "Article I [the union recognition clause of the agreement] therefore constitutes a limitation upon the Company's right to contract out."); *Dreis & Krump, supra,* 802 F.2d at 253-54 (similar; also reviewing past practice regarding contracting out); *NCR Corp., supra,* 906 F.2d at 1501-02, 1504 n. 11, 1506 (arbitrator construed recognition clause of contract versus ambiguous management functions clause to find, in light of past practice and NLRA requirements, that recognition clause prohibited the grieved subcontracting); *Edward Hines Lumber, supra,* 764 F.2d at 633 (recognition clause of contract, as well as past practice that was so well established and long-standing as to become part of the contract, barred contracting out all bargaining unit work).

In any event, regardless of the accuracy *vel non* of the Union's assertion of a "circuit split" concerning inherent management rights, the decisions below in the instant matter did not depend on this proposition alone because the Agreement also contained, in Article XLII, Section A, an *express* contractual reservation of all management rights to ARH except as otherwise specifically limited by a term of the Agreement. (Pet. App. at 29a) The Union attributes to the court of appeals below the view that, once the arbitrator found that there was no contract provision "permitting" the Hospital to require an employee to work past his regular shift (a conclusion which, as discussed above, simply ignored the Agreement's plain language), the arbitrator was constrained to hold that the right to schedule such work was inherently reserved to

the Hospital. (Petition at 9) This reasoning is only half correct, however, because the court of appeals correctly observed that such management rights were not only inherently, but also expressly – per Article XLII – reserved to the Hospital. *See Appalachian Regional Healthcare, Inc. v. United Steelworkers of America*, 245 F.3d 601, 605-06 (6th Cir. 2001) (Pet. App. at 6a-9a). Accordingly, even if the inherent management rights principle were to be taken out of the picture entirely, it would not result in reversal of the lower courts' decisions here. Thus, it would not be a productive use of the Court's time and resources to address this nondispositive issue.

D. THIS ACTION WAS BROUGHT AND HAS BEEN RESOLVED EXCLUSIVELY UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT GOVERNING LABOR ARBITRATIONS. THE UNION'S ATTEMPT TO INJECT THE NEW, UNRELATED ISSUE OF THE STANDARD FOR VACATUR UNDER THE FEDERAL ARBITRATION ACT, 9 U.S.C. § 10(a), GOVERNING COMMERCIAL ARBITRATIONS, SHOULD BE REJECTED.

Finally, the Union hyperbolically claims that this case involves important issues of federal arbitration law and dramatically asserts that "[t]he time has come for this Court to harmonize the 'draws its essence' test for labor arbitration awards under Section 301 [of the Labor Management Relations Act, 29 U.S.C. § 185(a)] with the [Federal] Arbitration Act's grounds for vacating arbitration awards contained in [9 U.S.C.] Section 10(a)." (Petition at

15) This expansive invitation should be declined for a number of reasons.

First, this issue was never raised, let alone addressed, at any stage of the proceedings below. It should be rejected on that ground alone. *See, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981) ("Although defendant's petition for certiorari presented the question of the District Judge's abuse of discretion in denying defendant's costs under Rule 54(d), that question was not raised in the Court of Appeals and is not properly before us."); *Sisson v. Ruby*, 497 U.S. 358, 359 n. 1 (1990) (declining to consider argument under different statute that was not raised below); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969) (dismissing writ of certiorari after discovering in oral argument that issue had not been raised below). The instant case was brought, and has been analyzed and decided, exclusively under Section 301, in accordance with this Court's seminal decision in *Textile Workers Union of America v. Lincoln Mills*, 353 U.S. 448 (1957). There has never been any application or consideration of the Federal Arbitration Act ("FAA") in this case, which applies to commercial, not labor, arbitration. There is no justification, other than the Union's desperation to manufacture an issue on appeal, to inject this tangential, wholly unnecessary issue into the case at this late date.

Furthermore, even a cursory review of decisions by the courts of appeals indicates that the standard applied in actions to vacate arbitration awards under the two statutes is already in substantive harmony. As discussed above, the standard under Section 301 is that an arbitrator's award is not to be disturbed unless he has exceeded

his powers by failing to draw its essence from the collective bargaining agreement, ignoring the agreement's plain language and instead importing his own notions of industrial justice. *Misco, supra,* 484 U.S. at 38; *Enterprise Wheel, supra,* 363 U.S. at 597. Similarly, Section 10(a) of the FAA states in relevant part that: "In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . . (4) where the arbitrators exceeded their powers . . . . " 9 U.S.C. § 10(a)(4). The arbitrator in this case exceeded his authority under either standard by, as discussed above, violating Article XXXIII, Section K of the Agreement, which states that the arbitrator "shall have no power to add to, subtract from, or modify in any way, any terms of the Agreement, nor shall he exercise any responsibility or function of the Hospital . . . . " (Pet. App. at 28a)

The courts of appeals for many years have consistently interpreted this "exceeded powers" ground for vacatur under § 10(a) of the FAA as consonant with the *Enterprise Wheel* "draws its essence" standard under Section 301, and indeed have drawn upon labor arbitration case law for support. In *Inter-City Gas Corp. v. Boise Cascade Corp.*, 845 F.2d 184 (8th Cir. 1988), for example, the court observed that:

> The arbitrator's authority, however, is not unlimited. Although the arbitrator may interpret ambiguous contract language, the arbitrator may not disregard or modify unambiguous contract provisions. As the Supreme Court has stated in the labor context, "The arbitrator may

> not ignore the plain language of the contract." More specifically, if the arbitrator "interprets unambiguous language in any way different from its plain meaning, [the arbitrator] amends or alters the agreement and acts without authority."

Id. at 187 (citations omitted); *see also, Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2nd Cir. 1997) (courts are not to "second guess an arbitrator's resolution of a contract dispute . . . . However, awards may be vacated . . . in the limited circumstances where the arbitrator's award is in manifest disregard of the terms of the agreement"); *Michigan Mutual Ins. Co. v. Unigard Security Ins. Co.*, 44 F.3d 826, 830-31 (9th Cir. 1995) ("An arbitration award may be overturned if it does not 'draw its essence' from the contract . . . . To consider whether an award drew its essence from the . . . agreement, the court must ensure that the arbitrator looked to the words of the contract . . . . "); *Anderman/Smith Operating Co. v. Tennessee Gas Pipeline Co.*, 918 F.2d 1215, 1218 (5th Cir. 1990) ("as long as the arbitrator's decision 'draws its essence' from the contract, the award must be confirmed. To draw its essence from the contract, 'an [arbitrator's] award must have a basis that is at least rationally inferable, if not obviously drawn, from the letter or purpose of the . . . agreement. The award must, in some logical way, be derived from the wording or purposes of the contract."); *Jenkins v. Prudential-Bache Securities, Inc.*, 847 F.2d 631, 634-35 (10th Cir. 1988) (applying labor arbitration "draws its essence" standard to its review of commercial arbitration award under § 10(a) of FAA, court held that "the sole question for our

consideration is whether the arbitration panel ignored the plain language of the contract").

Therefore, even if § 10(a) of the FAA were relevant or had been at issue in this proceeding, there would be no need for this Court to "harmonize" it with Section 301; the courts of appeals already have been doing so consistently for well over a decade.

CONCLUSION

For each and all of the reasons set forth above, Respondent Appalachian Regional Healthcare, Inc. respectfully requests that the Union's Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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